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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1952

No. 168

ALBERT WILLIAMS JOHNSON,
Petitioner,

vs.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS AND BRIEF IN SUPPORT THEREOF.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Albert Williams Johnson, petitioner above-named, respectfully prays for a Writ of Certiorari to the Court of Claims of the United States to review a judgment of that Court (R. 32) entered April 8, 1952, dismissing plaintiff's petition. A certified transcript of this Record in this case is furnished herewith, in accordance with Rule 41 of the rules of this Court.

Statement

This case presents the question whether Albert Williams Johnson, a resigned Judge of the United States District Court for the Middle District of Pennsylvania, was entitled

to receive his salary, after resignation, and whether the Act of Congress adopted June 24, 1946 (Pub. L. 432), 60 Stat. 304, called the "Johnson Act", is unconstitutional as a Bill of Attainder and as destroying a vested right.

The Petitioner, Albert Williams Johnson, was appointed United States District Judge for the Middle District of Pennsylvania by the President of the United States on May 21, 1925, and having held a commission for that office continuously for twenty years, one month and seven days, and having attained the age of seventy-two years and seven months, resigned from that office on June 29, 1945. His resignation was submitted to the President on June 29, 1945, and was accepted on July 5, 1945.

Under the Act of Congress of February 25, 1919, Ch. 29, Sec. C; Judicial Code, Section 260, 40 Stat. 1157, 28 U. S. C. Section 375, as amended, petitioner was entitled to receive the same salary he had received at the time of his resignation, namely, $10,000.00 per annum for the remainder of his natural life.

On July 14, 1945, petitioner signed a written instrument purporting to relinquish the salary to which he was entitled under the retirement provisions of the said Act of Congress, which written instrument was addressed to "Committee on the Judiciary, House of Representatives, United States." A copy of the purported relinquishment will be found as part of Paragraph 6 of the petition, page 2 of the Record.

On February 8, 1946, petitioner rescinded the said relinquishment and demanded payment of his salary in a letter addressed to Honorable Henry P. Chandler, Director, Administrative Office of the United States Courts, the Honorable Preston Delano, Comptroller of the Currency of the United States, and the Honorable Fred M. Vinson, Secretary of the Treasury of the United States. A copy of this letter is incorporated in Paragraph 8 of the peti-

tion and appears at Pages 3 and 4 of the Record. In it, the petitioner stated that at the time he executed the purported waiver, he was ill and incapacitated, physically and mentally, and unable to realize the import of his action.

That the said Honorable Henry P. Chandler, Director, replied to the communication from the petitioner stating in effect that payment of the salary would not be made without a decision of the court ordering such payment.

When petitioner signed the instrument purporting to be a renunciation of his salary, a vested right, he received no legal consideration therefor.

The Judiciary Committee of the House of Representatives was at that time investigating a situation of alleged corruption in the Middle District of Pennsylvania. Its authority was limited to investigation, and to recommend or not to recommend impeachment proceedings to the United States Senate. No impeachment was recommended and no trial was held by the United States Senate. Petitioner was indicted on charges investigated by the said committee, and tried by the United States District Court for the Middle District in Harrisburg, Pennsylvania, and on March 24, 1947, was found "Not Guilty" by a jury.

After petitioner had revoked his alleged renunciation of salary, a bill was passed by the Congress of the United States and enacted into law on the 24th day of June, 1946, purporting to accept the renunciation of salary.

This Act reads as follows:

> "An Act to accept the renunciation by Albert W. Johnson of pension under Sec. 260 of the Judicial Code.
>
> Be it enacted etc.
>
> That after July 14, 1945, no payments shall be made under Section 260 of the Judicial Code to Albert W. Johnson (or his estate), formerly district judge of the District Court of the United States for the Middle District of Pennsylvania, who resigned as such judge on

July 3, 1945, and who, on July 14, 1945, renounced and relinquished his rights under Section 260 of the Judicial Code to receive the salary therein provided for judges who resign after having served at least ten years and having attained the age of seventy years."

Petitioner alleged in the Court of Claims that this action was unconstitutional and void first as having been passed after the said renunciation was revoked; secondly as being in the nature of a Bill of Attainder prohibited by the Constitution of the United States; thirdly as depriving the plaintiff of a vested right.

The United States filed a General Traverse to the allegations of the petition, which traverse was withdrawn and a demurrer filed alleging that the facts set forth in the petition "do not state a cause of action against the United States within the jurisdiction of this court" (R. 6).

The Opinion of the Court of Claims was delivered by Honorable Sam E. Whitaker, with a concurring opinion by the Honorable J. Warren Madden. The Court sustained the position of the petitioner, deciding that the amount due under the Act of Congress was neither a pension nor a gratuity but a salary to which he was entitled for the remainder of his life; that so long as Section 260 of the Judicial Code stands unrepealed, a judge can demand the benefit of it as of right, and that he has the right to demand it not as a bounty or gratuity but as "a sum promised in consideration of a right surrendered," and also expressed doubt that Congress could take that right away from a judge who had previously resigned under the circumstances set out in this case.

After thus deciding the first important point in favor of the petitioner, the Court took under consideration the circumstances under which the resignation was given and what followed the resignation. It mentions specifically that at the time the relinquishment was submitted on July

14, 1945, proceedings preliminary to impeachment were pending before the Judiciary Committee of the House; that the petition did not allege all of the circumstances under which the letter of resignation and the letter of renunciation were written, but the court took judicial notice of the contents of the Report of the House Judiciary Committee, to whom the petitioner's letter was addressed. The portion of the Report referred to by Judge Whitaker will be found in the Record, Pages 13 to 15.

The Court below decided that the letter of resignation and letter of renunciation caused the Committee to decide not to recommend impeachment, and that petitioner was estopped to assert any claim to those things which he had renounced in order to prevent impeachment. The Court decided further that the petitioner had no power to revoke his renunciation of salary and that independent of the Act of 1946, he was estopped from recovering.

The Court then decided finally that inasmuch as the Government admitted that petitioner's allegation of mental incapacity would be sufficient to vitiate his act if his allegation is true, the Demurrer must be overruled and the case referred to a Commissioner for the purpose of taking proof "on that question and such other questions as may appear to be relevant."

Judge Madden concurred in the Order overruling the Demurrer but stated that in his opinion "The plaintiff's renunciation of what he was entitled to under the statute was without effect," and also that he considered that the question, "Whether the plaintiff was of sound mind or not when he purported to renounce his statutory right" was irrelevant. Judge Madden also stated that in his opinion, the Act of June 24, 1946, "is a bill of Pains and Penalties which, according to the precedents, is a Bill of Attainder as that expression is used in the Constitution." He ex-

pressed his opinion that the act is unconstitutional and, therefore, no bar to the plaintiff's action.

Thereafter, the matter was referred to a Commissioner who heard the evidence and filed his report. Following the closing of petitioner's proof, the defendant had moved for a dismissal under Rule 49(b). The Commissioner found that "at the time of signing the letter and during the evening conference the night before, plaintiff thoroughly understood the nature and consequences of his act of renouncing his right to receive the pay of a resigned Federal Judge." He finally concluded that "Pursuant to the authority of the Rule 49(b) it is recommended that the motion of the defendant be allowed and that upon the authority of the opinion of the court rendered herein June 28, 1948, the petition be dismissed."

Exceptions were filed by the petitioner and finally on April 8, 1952, the court filed its Opinion, delivered by Judge Whitaker, and ordered and adjudged that the Petition bs dismissed. This Order was made in view of the finding that at the time of the signing of the letter, plaintiff understood the nature and consequences of his act and "for the reasons expressed in the former Opinion" (R. 31). Again Judge Madden filed an Opinion, this time dissenting from the Opinion dismissing the plaintiff's petition. He did not agree with the Court's conclusion that the plaintiff had lost the right to the pay which the statute has granted him, unless he was mentally incompetent when he purported to renounce that right. The learned judge says (R. 31):

> "I thought then and still think that even if, as the court now finds after an extended hearing, the plaintiff was mentally competent at the time of his attempted renunciation, his attempt to renounce was futile. My views to that effect—that the Act of June 24, 1946, 60 Stat. 304, was a bill of pains and penalties and was therefore unconstitutional—appear in 111 C. C. L. S.,

at Page 761, and will not be repeated here. I think the plaintiff is entitled to recover."

Statutes Involved

Act of February 25, 1919, ch. 29, Section C; Judicial Code, Section 260; 28 U. S. C. Sec. 375, as amended, the relevant portion of which is as follows:

> "That when any judge of any court of the United States, appointed to hold his office during good behavior, resigns his office after having held a commission or commissions as judge of any such court or courts at least ten years continuously, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the salary which is payable at the time of his resignation for the office that he held at the time of his resignation • • •"

Act of June 24, 1946 (Pub. L. 432), 60 Stat. 304, which reads as follows:

> "An Act to accept the renunciation by Albert W. Johnson of pension under Sec. 260 of the Judicial Code.
>
> Be it enacted etc.
>
> That after July 14, 1945, no payments shall be made under Section 260 of the Judicial Code to Albert W. Johnson (or his estate), formerly district judge of the District Court of the United States for the Middle District of Pennsylvania, who resigned as such judge on July 3, 1945, and who, on July 14, 1945, renounced and relinquished his rights under Section 260 of the Judicial Code to receive the salary therein provided for judges who resign after having served at least ten years, and having attained the age of seventy years."

Jurisdiction to Review

Jurisdiction of this Court is invoked under Title 28 United States Code, Sections 1255 (1), 1651 (a) and 2101 (c).

The judgment of the Court of Claims of the United States was entered on April 8, 1952.

Questions Presented

1. Did the Court of Claims err in submitting to a Commissioner the question of mental capacity of the petitioner at the time that he signed the purported renunciation of salary and in basing its decision against petitioner on the Commissioner's finding?

2. The right to salary granted by law to a resigned Federal Judge, being a property right or vested right, can he be deprived of it?

3. Was the purported renunciation of future salary, later withdrawn, legally effective?

4. Is the Act of June 24, 1946, the Johnson Act, unconstitutional as a Bill of Pains and Penalties in the nature of a Bill of Attainder?

5. Is the petitioner entitled in law to his salary as a resigned judge during the remainder of his natural life?

6. Did the Court of Claims err in taking judicial notice of the contents of the report of the Judiciary Committee of the House of Representatives (H. R. 1639, Seventy-Ninth Congress, 2d Session) to whom plaintiff's letter of renunciation was addressed, where said report expressed merely the opinion of the majority of the Committee and did not take into account a vigorous minority report contained therein, and especially where the plaintiff's judicial conduct was thereafter vindicated by his acquittal by a court and jury in a criminal trial involving the same charges made in said report?

Reasons Relied On for Allowance of the Writ

1. The Court of Claims did not decide the question of the constitutionality of the Act of 1946, and petitioner urges that this is of vital importance not only to his own case but also to that of other claimants who may be similarly situated.

2. A reading of the "Questions Presented" discloses

plainly that they raise important questions of Federal Law which have not been but should be settled by this Court.

Wherefore, your petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court directed to the Court of Claims of the United States, sitting in Washington, D. C., commanding said Court of Claims to certify and set up to this Court, on a date to be designated, a fully and complete transcript of the Record of all proceedings in said Court of Claims heretofore had in this case, to the end that this case may be reviewed and determined by this Court; that the judgment of the Court of Claims be reversed; and that your petitioner be granted such other and further relief as may seem proper.

ALBERT WILLIAMS JOHNSON,
Petitioner,

By CHARLES J. MARGIOTTI,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION

Opinion of the Court Below

The Opinion of the Court of Claims on the Government's Demurrer entered on June 28, 1948 is reported in 111 C. cls. 750.

The Opinion of the Court of Claims of the United States, handed down on April 8, 1952 (R. 26), is reported in 104 Federal Supplement 106.

ARGUMENT

I

Question of Mental Capacity of Plaintiff Immaterial

Petitioner, hereinafter referred to as "plaintiff," respectfully submits that the Court of Claims erred in referring to a Commissioner the matter of his mental capacity at the time he signed the purported renunciation of salary, after finding that he had a vested right to the said salary of which he could not be deprived. At that time the case was before the Court on a Demurrer by the Government, hereinafter sometimes referred to as "defendant." In consideration of a Demurrer, all facts pleaded in the petition must be assumed to be true: Cyclopedia of Federal Procedure (2nd Ed.) Vol. 5 Sec. 1583, P. 216. The law is stated thus in United States vs. Henry J. Hosmer, 76 U. S. 432, 9 Wall. 432, 19 L. Ed. 662:

> " 'This is an appeal from the judgment of the Court of Claims. The case was decided by that court upon a demurrer to the claimant's petition. The facts set forth in the petition were admitted by the demurrer.' Judgment of the Court of Claims in favor of the petitioner was affirmed."

Taking this view of the law, we have the following facts pleaded in the Petition at Page 3:

> " 'That at the time plaintiff signed the said instrument purporting to relinquish his salary, he was ill mentally and physically and unable to comprehend the nature and consequences of his act.' "

In the Opinion filed by this Court June 28, 1948, Judge Whitaker stated at Page 16:

> " 'Finally, plaintiff says that at the time his letter of renunciation was written he was mentally incapacitated. The Government admits that his allegation of mental incapacity is sufficient to vitiate his act, if his allegation is true'."

Therefore, the Court should have taken as true, without requiring any testimony thereon, the allegation in the petition above referred to that at the time the plaintiff signed the said instrument purporting to relinquish his salary, "he was ill mentally and physically and unable to comprehend the nature and consequences of his act." (R. 3). The Government having admitted that this allegation of mental incapacity, if true, would be sufficient to vitiate his act, was bound by such admission and under the law the court at that time was required to make an Order overruling the Demurrer. However, this question of mental incapacity is irrelevant to the issue for the more important reason that having a vested right to receive his salary as a resigned Federal Judge, he could not be deprived of it either by his own act or by the act of any other person or body.

II

The Right to Salary, Being a Vested or Property Right, Plaintiff Could Not Be Deprived of It

There was nothing upon the Record of this case to show why the plaintiff made his renunciation until the Court saw fit to take judicial notice of the proceedings of the Judiciary Committee of the House, referred to at length in its Opinion (R. 13). It was merely a conclusion that the motive compelling him to renouce his salary must have been to prevent his impeachment. Said letter was a nullity even before it was withdrawn by the plaintiff. The letter of renunciation was signed on July 14, 1945, and was addressed to the Committee of the Judiciary, House of Representatives, United States; the letter revoking and rescinding the said writing, and demanding payment of salary, was dated February 8, 1946, and was addressed to the Director of the Administrative Office of the United States Courts, the Comptroller of the Currency of the United States and the Secretary of the Treasury of the United States. Thereafter, immediately before the passage of the so-called Johnson Act, on June 24, 1946, the Congressional Record of the Seventy-Ninth Congress, Second Session, reveals at Page 2377, Volume 92, that the letter in which Judge Johnson withdrew his relinquishment of salary was read into the Record in full, and the Congress before passing the Act of 1946 had full knowledge that he had already withdrawn the relinquishment of his salary.

The Court below has found that the right to salary was a contract right. This being so, we respectfully submit that the law of contract governs throughout and that the renunciation of salary required an acceptance before it could be legally effective, and we would refer this Court to the legal points which are pertinent to this question:

(a) The relinquishment of his salary by Judge Johnson, if otherwise valid, was not a contract until it was accepted by the United States, and so long as it was not accepted the contract was not complete and the whole matter might be terminated at any time. In *Leo P. Rich* v. *G. W. Pifer Sons*, 100 Pa. Superior Ct. 483, the Superior Court of Pennsylvania has decided that:

> "Nothing is better settled than that in order to constitute a contract there must be an offer on one side and an unconditional acceptance on the other. So long as any condition is not acceded to by both parties to the contract, the dealings are mere negotiations and may be terminated at any time by either party while they are pending. There must be a meeting of minds in order to constitute a contract. This doctrine is very familiar and has been recognized many times in our Courts."

The same quotation appears in *Alexanian* v. *Fidelity-Phila. Trust Co.*, 152 Pa. Superior Ct. 23 (30 A. 2nd 651) and in *Cohn* v. *Penn Beverage Co.*, 313 Pa. 349-351 (169 A. 768). In the earlier case of *Vincent* v. *Oil Co.*, 165 Pa. 402 (30 A. 991) the Supreme Court said in the Opinion on Page 409, referring to offer and acceptance:

> "Until it is accepted, it may be withdrawn though that be in the next instant after it is made and a subsequent acceptance will be of no avail."

(b) In our case, the Congress of the United States, the only party who could make a contract with the plaintiff in a matter of this kind, must have realized that the mere renunciation of salary without more, was not sufficient in law, and therefore passed the Act of 1946 purporting to accept the renunciation of Judge Johnson.

(c) It is elementary that to constitute a contract the minds of the parties must have met upon the same thing at the same time; or, stated differently, a contract results from

an offer by one party in form which may be accepted, and its unqualified acceptance by the other. *Polich* v. *Severson*, 68 Mont. 225, 216, P. 785; *J. Neils Lumber Co.* v. *Farmers' Lumber Co.*, 88 Mont. 392, 397, 293, P. 288: *Schwartz* v. *Inspiration Gold Mining Co.*, 15 F. Supp. 1030-1037.

(d) Speaking of contract in general, we find the following in 17 C. J. S., Sec. 34, at page 362:

> "Every agreement, whether written or oral, is the result of, and springs from, an offer and the acceptance thereof. The offer and acceptance must have the characteristics of a bargain and must be conventional counterparts, and knowledge of either party that the other party does not intend what his words or acts express prevents such words or acts from operating as an offer or acceptance."

It is important to note the last clause of the foregoing paragraph, i. e., *and knowledge of either party that the other party does not intend what his words or acts express prevents such words or acts from operating as an offer or acceptance.*" In the case at bar, the Congressional Record showed that at the time Congress purported to accept the renunciation of salary it had full knowledge that Judge Johnson had withdrawn the said renunciation, that he did "not intend what his words expressed" in the said renunciation, and therefore, the same was prevented from operating as an offer on his part and acceptance on the part of Congress, both of which are necessary to a contract.

Or as set out in *Frier* v. *Federal Crop Ins. Corp.*, 152 F. 2nd, 149-150 (C.C.A. 5):

> "It has long been settled that to make a contract there must be an offer and an acceptance shown."

In *Farren* v. *McNulty*, 277 Pa. 279 (121 A. 501) we find that "It is a requisite of every contract that there be an offer and acceptance."

(e) The United States in its motion takes the position that the consideration for Judge Johnson's relinquishment of salary was that impeachment proceedings would not be instituted against him. The majority Opinion of this Court took the same view of the matter and went further to state that having reaped the benefit of his act, namely, prevented impeachment, the plaintiff could not in good conscience rescind his renunciation. If the moving factor back of Judge Johnson's renunciation of salary was to prevent impeachment and this fact was known to the Judiciary Committee or Congress, and accepted by it, then we submit that such a contract would be void as against public policy. On Page 58 of our Brief in Opposition to the Demurrer, we find the following quotation from the Congressional Record, "This is a flagrant case where a Federal Judge sold justice." If that statement were true (which we emphatically deny) then the Congress was derelict in its duty to the public when it accepted the report of the Congressional Committee which did not recommend impeachment, and proceeded to punish the plaintiff in a manner not permitted by the Constitution of the United States, namely, by a Bill of Attainder, i. e., the Act of 1946. If Judge Johnson were guilty of the offenses mentioned in the report of the Committee, although the jury found otherwise by acquitting him, Congress was forced to proceed according to law to impeach him, and no contract could be given effect the result of which would be to bargain away this duty to the public.

In 17 C. J. S., Sec. 212, Page 573, we read:

> "Public officers should act from high consideration of public duty, and hence every agreement whose tendency or object is to sully the purity or mislead the judgments of those to whom the high trust is confided is condemned by the courts."

And in the same volume, Section 221, Page 591, we find that:

> "Contracts which induce or tend to induce a breach or neglect of official duty, or which deceive or tend to deceive a public officer in the performance of his duties, are void as against public policy • • •
>
> "An agreement or contract made by individuals with public officials for the purpose of influencing the exercise of discretion vested in them by law, as to the manner in which they shall perform public duties, although the consideration for such agreement or contract inures to the benefit of the public, is void as against public policy."

(f) Again, while the defendant sets out that the consideration for the relinquishment of salary was the withdrawal of impeachment proceedings, it is important to distinguish between motive and consideration. In 17 C. J. S., Sec. 93, Page 439, it is stated as a general principle that: "Motive for a promise does not supply the element of consideration", and then proceeds to develop the subject matter as follows:

> "Consideration is broadly stated to be the reason or motive which induces the contracting parties to enter into the undertaking, but motive and consideration must be distinguished, for they are not the same thing. The fact that there is a motive for a promise does not supply the element of consideration, and conversely, the fact that there is no motive for a promise will not deprive it of consideration."

Nor can the relinquishment of salary be considered as a "gift to the Government."

In *Kelly* v. *Huplite,* 103 Pa. Superior Ct. 430, it was decided that the essential elements to institute a valid gift are the intention of the donor to make a gift and its acceptance by the donee. If the relinquishment of salary by Judge Johnson could thus be viewed in the light of a gift to the

United States, the same was not accepted until Congress passed the Act of 1946, and then it was too late because prior to the passage of said act, the offer of the gift had been withdrawn.

Whether this relinquishment of salary be regarded in the nature of a gift or sounding in contract, the United States, defendant, could not force the plaintiff to relinquish, in whole or in part, any portion of the salary to which the Act of Congress entitled him, nor could it force him to continue in such relinquishment after he realized his legal rights and withdrew the relinquishment.

In *United States* v. *Bostwick,* 94 U. S. 53 (23 Wall. 65), the Supreme Court of the United States, speaking through Mr. Justice Waite, decided that:

> "The United States, when they contract with their citizens are controlled by the same laws that govern the citizens in that behalf. All obligations which would be implied against citizens under the same circumstances will be implied against them."

In *Miller* v. *United States,* 103 Fed. 413, it was decided that:

> "One holding an office under the treasury department, who was appointed by the secretary, in connection with such office, a special inspector of foreign vessels, without additional salary, under Act Aug. 7, 1882, which requires such officers to be appointed, and fixes their salary, and who accepted the appointment and performed the duties of the office, is entitled to recover the salary. It is not within the power of the secretary to reduce or change the salary of an officer which congress has specifically prescribed, *and an agreement to that effect, being contrary to public policy, will not be enforced or given effect as an estoppel.*"

Any agreement between the plaintiff in our case and the Judiciary Committee of Congress, such as that if he relin-

quished his salary he would not be impeached, could have no effect in depriving him of the salary to which he was entitled as a resigned judge, and as stated in the Miller Case, such agreement would not be "given effect as an estoppel."

In *Werner* v. *Hillman Coal & Coke Co.*, 300 Pa. 256, 150 A. 471, it was decided that a prothonotary may recover the amount of the fee fixed by law for making copies of records and papers in his office *thought he may have agreed to furnish them for a lesser sum*.

The leading case on this subject is *Glavey* v. *United States*, 182 U. S. 595, 21 Supreme Ct. 891, where it was held that a local inspector of the hulls of steam vessels was entitled to the compensation established by the Act of Congress *even though the appointment was made with the distinct understanding that he was not to receive such compensation.*

In *People ex rel. Satterlee* v. *Board of Police*, 75 N. Y. 38, 42, the Supreme Court of New York held:

> "The law does not recognize the principle that a board of officers can reduce the amount fixed by law for a salaried officer, and procure officials to act at a less sum than the statute provides, or that such official can make a binding contract to that effect. The doctrine of waiver has no application to any such case, and cannot be invoked to aid the respondent.
>
> "The ruling in that case was reaffirmed in Kehn v. State, 93 N. Y. 291, 294, which involved the claim of a fireman whose compensation had been reduced by his superior officer below that fixed by law. The court, speaking by Judge Rapallo, reaffirmed the principles of the Satterlee Case, and approved the decision in Goldsborough v. United States, Taney Dec. 80, 88, Fed. Case No. 5,519, saying: 'The present case, however, is stronger than either of those cited. At the time the appellant entered into the service his pay was fixed by law, and there is no evidence that he ever consented to a change. It was reduced by the superintendent, and

for a portion of the time the appellant took the reduced pay, but that does not estop him from claiming his full pay if he was legally entitled to it.'

"In the Goldsborough Case referred to, Chief Justice Taney said: 'Where an act of Congress declares that an officer of the Government or public agent shall receive a certain compensation for his services, which is specified in the law, undoubtedly that compensation can neither be enlarged nor diminished by any regulation or order of the President, or of a department, unless the power to do so is given by act of Congress.'

"In Adams v. United States, 20 Ct. Cl. 115, which involved the compensation due to one who had performed the duties of an inspector and also of deputy collector of customs, the court said: 'The law creates the office, prescribes its duties, and fixes the compensation. The selection of the officer is left to the collector and Secretary. The appointing power has no control, beyond the limits of the statute, over the compensation, either to increase or diminish it.' In the same case it was also said: 'Monthly vouchers were drawn up, reciting the number of days the claimant was employed during the month and the amount of compensation allowed by the collector and Secretary, ending with a receipt "in full for compensation for the period above stated," which the claimant signed. *We do not think he thereby relinquished his right to claim the further compensation allowed by law.* If the appointing officer has no power to change the compensation of an inspector, certainly the paying officer has not. He had no right to exact such a receipt and the claimant lost nothing by signing it. Fisher's Case, 15 Ct. Cl. 323; United States v. Bostwick, 84 U. S. 53, 24 L. Ed. 65.'

"We are of the opinion that as the act of 1882 created a distinct, separate office—special inspector of foreign steam vessels—with a fixed annual salary for the incumbent, to be paid by the Secretary of the Treasury out of any moneys in the Treasury not otherwise appropriated; as the plaintiff was legally appointed by the Secretary a special inspector under and by virtue alone

of that act; and as he entered upon the discharge of the duties appertaining to that position, he was entitled to demand the salary attached by Congress to the office in question.

* * * "The purpose of Congress as indicated by the act of 1882, was to compensate the services of a special inspector of foreign steam vessels by an annual salary of a specified amount. *It was not competent for the Secretary of the Treasury, having the power of appointment, to defeat that purpose by what was, in effect, a bargain or agreement between him and his appointee that the latter should not demand the compensation fixed by statute.*"

In *Taylor* v. *Philadelphia*, 126 Pa. Superior Ct. 196, 190 A. 663, the following principles of law are recognized:

"The mere acceptance by a public officer of less than the salary fixed by statute as belonging to his office does not constitute a waiver of his right to demand payment of the full amount of his salary or estop him from recovering the balance unpaid.

"Public policy does not prevent a municipal or state officer, in times of great public distress, from voluntarily donating to his city, county or state such part of his salary or emoluments of office as he sees fit to give up for the relief of the municipality or state.

"Any form may be adopted which carries out the intention of the parties, provided the donation by the public officer of part of his salary is voluntary and individual and is to continue only so long as he wishes."

It is important to note in the foregoing case that the State of Pennsylvania recognizes the right of the individual to donate a part of his salary to the Government so long as he sees fit to make such donation, but gives effect to such act only if it is established to be the voluntary act of the officer and clearly and definitely proved to be such *and is to continue only so long as he wishes.* Further, that no contract relative to the execution or continuance of such a

gift or donation can be enforced, nor can it arise by waiver or estoppel.

In our case, if the relinquishment of salary can be construed as a donation or gift to the Government by Judge Johnson, then under the foregoing decision it could be withdrawn by him at any time, otherwise it would not remain voluntary, no contract relative to the continuance of such gift could be enforced and it could not arise by waiver or estoppel. Therefore, when Judge Johnson withdrew the relinquishment of his salary, he evidenced his intention to withdraw or discontinue the donation if it be so construed.

In *Werner* v. *Hillman Coal & Coke Co.*, above referred to, it was further held:

> "The sum stated in a fee bill as the amount which shall be paid to a public officer, for services to be rendered by him in connection with his office, cannot be increased or diminished by a special contract between the parties. All such contracts are against public policy and void."

In *Schwarz* v. *Philadelphia*, 337 Pa. 500 (12 A. 2nd 294), the Supreme Court followed the ruling of the Superior Court in *Taylor* v. *Philadelphia, supra*, when it made the following pronouncement relative to the acceptance of less salary than authorized by law by the coroner of Philadelphia and its real estate assessors. The Court said:

> "There is no public policy of the Commonwealth which prevents a public officer, whose salary is payable by the city, from voluntarily donating to the city, in times of public distress, such part of his salary or emoluments of office as he sees fit to give up for the relief of the city, *provided it is clearly and unequivocally establish to be his voluntary act, and is to continue only so long as he wishes.*"

In *United States* v. *Andrews*, 240 U. S. 90, 36 Supreme Ct. 349, it was held that an Army officer is not bound by his

acceptance of leave of absence without protest against the affixing of the condition that the leave shall be without pay. The courts said that the reason why he is not bound is that: "Such condition contravenes the express terms of the Act of Congress by which he is entitled to half pay during the leave."

In the *Andrews* case, the Court of Claims upheld the claimant's petition and he received a judgment in the amount of $325.00. The United States filed an appeal and the Supreme Court, which affirmed the decision of the Court of Claims, speaking through Mr. Chief Justice White, said at page 351:

> "The contention as to the estoppel resulting from the failure to protest against the condition affixed to the leave, and the binding force of such condition, even if illegal, resulting from an acceptance of the leave containing it, is by necessary implication foreclosed by all the cases previously cited, and in fact was in express terms considered and held to be without merit in Glavey v. United States, 182 U. S. 595, 45 L. Ed. 1247, 21 Sup. Ct. Rep. 891. Because that case concerned an illegal condition attached to the performance of the duties of an office, and this involves an illegal condition attached to a grant of leave, affords no ground for distinction between that case and this. The basis of the ruling in the Glavey Case was the right of the official to rely upon the provisions of the statute, and the resulting want of power to apply a principle of estoppel. And as here there was express statutory authority for the half pay during the leave, the reason in the Glavey Case is controlling, and the distinction relied upon involves no difference justifying taking this case out of the principle settled in the Glavey case. As the statute conferred the right to the half pay during the leave, it necessarily follows that the exclusion of executive authority over that subject which resulted extended to and was coterminous with the power which the statute exerted."

In *Cochnower* v. *United States,* 248 U. S. 405, 39 Supreme Ct. 137, it is held that the creation of offices and the assignment of their compensation is a legislative function. This being so, the Judiciary Committee of Congress had no more power to give effect to a purported renunciation of salary in this case than the various boards and officials had in the cases above referred to.

In *Ford* v. *United States,* 69 F. Supp. 332 (Ct Cl.), the plaintiff, a field artillery officer who volunteered to make aerial flights and signed an application in which it was recited that he would receive no additional pay unless selected as a member of a test corps, was held not barred from claiming compensation for flight pay since his purported waiver of flight pay was a nullity. At Page 334, the following is especially applicable to our case:

> "Nor do we think defendant's second defense is good. The fact that the order requiring plaintiff to make the flights recited he would not be entitled to flying pay does not, and could not deprive him of the compensation to which he was entitled under the laws of Congress. An officer of the Army has no right to set aside an Act of Congress, or to take away from one of his subordinates a right given him by an Act of Congress.
>
> "Nor is plaintiff barred from claiming the compensation to which he was entitled under the laws of Congress by the fact that he volunteered to make the flights and signed an application therefor in which it was recited: 'It is understood that I will receive no additional pay or increased grade unless I am selected as a member of one of the test corps, and thereafter my pay will depend upon a grade recommended by the Chief of Field Artillery.'
>
> "Even if this can be construed to constitute a waiver of flying pay, it is, nevertheless, a complete nullity, under a number of decisions of this court and of the Supreme Court; e. g., Glavey v. United States, 182 U. S. 595, 21 S. Ct. 891, 45 L. Ed. 1247; United States v. Andrews, 240 U. S. 90, 36 S. Ct. 349, 60 L. Ed. 541;

MacMath v. United States, 248 U. S. 151, 39 S. Ct. 31, 63 L. Ed. 177; Bancroft v. United States, 56 C. Cl. 218, affirmed on appeal 260 U. S. 706, 43 S. Ct. 165, 67 L. Ed. 473.

"Plaintiff's pay is fixed by Act of Congress, and not by the Chief of Field Artillery, and neither this officer nor any other one had a right to require him to waive or forfeit the pay to which he was entitled under the Acts of Congress. If it is to be said that he waived his right to flying pay, this waiver, under the authorities cited, is a complete nullity.

"Plaintiff is entitled to recover, Judgment will be entered in his favor and against the United States for $1,619.06. It is so ordered."

Plaintiff submits that under the foregoing decisions, no waiver or estoppel could be asserted against him and that he was and is entitled to receive his salary as a resigned judge, unless prevented by the action of Congress in passing the so-called "Johnson Act," a consideration of which Act will hereinafter be placed before this court.

The conclusion of the Court of Claims that the plaintiff presented his letter of renunciation in order to prevent impeachment proceedings against him is not based upon any evidence in the record. There is nothing upon the record of this case which shows why the plaintiff made his renunciation; it being merely a conclusion that the motive impelling him to renounce his salary must have been to prevent impeachment. There is nothing in the evidence anywhere to show that plaintiff signed the waiver to escape impeachment proceedings. In fact the record shows the contrary. The Chairman of the subcommittee stated when the waiver was handed to the Committee, that there was no commitment or understanding . . . that *"I also wish to make it clear that there are no conditions pertaining to its acceptance."* In fact the Committee had no right or power to make or accept

any conditions or to have any understanding pertaining to the purported waiver. Its action in making such conditions or having such understanding would have been unconstitutional, illegal, contrary to the resolution of the House appointing the committee, and also against public policy. If the moving factor back of Judge Johnson's renunciation of salary was to prevent impeachment, and this fact was known to the Judiciary Committee or to Congress and, accepted by it, then it is submitted that such a contract would be void as against public policy. If Judge Johnson were guilty of offenses mentioned in the report of the Committee, although a Federal jury later found otherwise by acquitting him, Congress was forced to proceed according to law to impeach him and no contract would be given effect the result of which would be to bargain away this duty to the public.

That the Committee and also Congress had no understanding that impeachment and criminal proceedings were to be dropped in consideration of plaintiff's purported waiver of his salary is seen in the subsequent history of this case. The Committee did not cease its prosecution of the plaintiff. It induced and secured an indictment and a trial on the very charges which were the bases of the pending proceedings—*a trial at which plaintiff was in due course vindicated and acquitted.* The Committee also proceeded to secure the passage of an unconstitutional act of Congress for the purpose of depriving plaintiff of his right to receive the salary of a resigned Federal Judge.

III

That the Court of Claims Erred in Taking Judicial Notice of the Contents of the Report of the House Judiciary Committee Where Said Report Contained Disputed Charges Against Plaintiff and Where Plaintiff's Judicial Conduct Was Thereafter Vindicated by His Acquittal in a Criminal Case Involving the Same Charges Made in Said Report.

Petitioner submits that the Court of Claims cannot take judicial knowledge of the record of the Judiciary Committee. In its majority opinion (June 28, 1948), this court held that it "may take judicial knowledge of the contents of the report of the House Judiciary Committee, to whom plaintiff's letter of renunciation was addressed". The Court of Claims stressed that the report shows that impeachment proceedings were pending at the time the letter of resignation and the letter of renunciation were written, and also that said letters caused the Committee to decide not to recommend impeachment. It is submitted there is nothing final, or settled or certain about the contents of the record or report of the Judiciary Committee. The record was composed of testimony before the Committee in sessions at some of which neither the plaintiff nor his attorneys were even present. The record also was made up of excerpts from the testimony of various witnesses before the Grand Jury where there was no cross examination, and of which neither plaintiff nor his attorneys had any knowledge until after the hearings and the publication of the record. Certainly, no court may take judicial knowledge of such indefinite, partial, uncertain and inconclusive record. Incidentally, it must also be noted that a minority report of the Committee condemned the Committee's action in passing in advance on plain-

tiff's innocence or guilt since such decision was not within the function of the Committee.

It appears that a number of most thorough investigations were conducted in plaintiff's Judicial District in which every one of his official acts was investigated. A Federal Grand Jury investigation was conducted at Scranton, Pennsylvania for almost a year. A House Judiciary Subcommittee investigation was also conducted at Washington, D. C., for the purpose of investigating his judicial conduct.* Plaintiff was present at only about three of the committee's hearings. Testimony taken before the Grand Jury was copied into the committee's record and later embodied in its report. Of much of the testimony and evidence in the committee's report, plaintiff could not possibly have had any knowledge until after he saw the printed record after the hearings were finished.

Under the circumstances of hysteria under which the congressional investigation was conducted and the report submitted, petitioner submits that the Court of Claims could not and should not have taken judicial notice of such a record. The proceedings of the Committee were largely ex-parte. There was nothing definite, certain or final about the record and no finding of guilt could be based on such a record. *Judicial notice can be taken only of facts accepted as true and capable of ready and unquestioned demonstration.* The record of the Judiciary Committee was not a finality nor was it intended to be, so that the Court of Claims should not have taken judicial notice thereof and should not have based any conclusion or any decision as to his judicial conduct thereon. The Senate of the United States alone could pass on his innocence or guilt.

This Court's attention is called to the minority report

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* For an article relative to the purposes, evils, etc. of Congressional Investigations, see "Congressional Investigations—A Symposium", 18 University of Chicago Law Review, Spring 1951.

of the committee which condemned the committee's prejudging of plaintiff and passing on his alleged guilt (virtually in a "Star Chamber" proceeding).

The best and most conclusive fact in support of plaintiff's innocence of the charges against him in the Committee's report is the verdict of "Not Guilty" of the Jury in the United States District Court for the Middle District of Pennsylvania in a criminal prosecution based on an indictment containing the same charges investigated by the Committee. The same Special Assistant to the Attorney General (who had conducted the proceedings before the Grand Jury and also the proceedings before the Committee) after the Committee proceedings were finished and after plaintiff's waiver of salary had been submitted to the subcommittee chairman (which waiver according to the Government, was designed to induce the Committee not to recommend impeachment proceedings) appeared before the same Grand Jury and secured an indictment containing all the same charges (almost *verbatim*) which had been covered at the Committee hearing. After a long and exhaustive trial, petitioner was acquitted. The same Special Assistant to the Attorney General, incidentally, was one of the counsel for the Government in the criminal prosecution.

The evidence is conclusive that there was no agreement or understanding that the proceedings of the Committee should automatically stop by plaintiff's waiver.

Petitioner further submits that the Committee's record and report were made up unfairly and in violation of his constitutional rights. It was not such a decision or final record as any court can or should take judicial notice of its contents. Therefore, there can be no estoppel based upon such record.

For the reasons above mentioned under Point II, petitioner submits that the Court of Claims erred in deciding

that he was estopped to withdraw his waiver of salary and to claim his salary now. In brief, these reasons are:

(1) Estoppel is an affirmative defense and must be pleaded—it was not pleaded by the Government.

(2) The Government cannot raise estoppel as a defense to deprive a public official or other person of a salary due from the Government.

(3) Estoppel can only be raised against a person whose action has misled the pleader of the estoppel to his or its injury, detriment or damage. Here, the Judiciary Committee was not misled nor the Government damaged. Otherwise, the chairman of the subcommittee would not have been so adamant in his statement (when the waiver was submitted) that there was no understanding or commitment involved in the submission of the waiver.

(4) In the purported waiver of salary, there was no agreement or understanding or commitment or request relating to the waiver. When the waiver was filed, the said subcommittee chairman stated in open session that the waiver should be filed for what it was worth and that it should be clearly understood that there was no commitment or understanding.

(5) There was no consideration either asked or given or offered for the waiver. Therefore, said waiver of a vested right was not binding and could be withdrawn.

(6) In any event, since the Court of Claims could not and should not have taken judicial notice of the Committee's record, the Court could not and should not have set up an estoppel based on the Court's notice of the contents of said record.

In conclusion, petitioner submits that the statement of the Sub-committee chairman—that the waiver should be filed for what it was worth and that it should be clearly understood that there was no commitment or understand-

ing with reference thereto—is inconsistent with the opinion of the Court of Claims (111 C. Cls. 750) that the resignation and letter of renunciation of the salary caused the committee to decide not to recommend impeachment.

It cannot be successfully contended that the members of the Committee were misled by the waiver of salary. The Committee's duty was clearly prescribed in the resolution and law of its appointment and existence. The Committee had no right or power to depart therefrom and was only authorized to hear the testimony and to make a report thereof to the House, which alone has the power to impeach.

Nor can it be held that there can be any estoppel of the plaintiff to claim his salary on the ground that he purportedly renounced the same in order to prevent impeachment. There can be no estoppel on his part because there was no promise or contention attached to the waiver and because there cannot legally be any commitments or conditions attached therewith. Therefore, the Committee could not have been misled in fact or in law and had no right or power itself to be diverted or influenced in its actions or duty. There is nothing in the record from which it can be found that the waiver was made to secure any advantage to the plaintiff. Therefore, it cannot now be claimed that the members of the Committee were influenced by the letter of renunciation.

IV

Act of June 24, 1946, the Johnson Act, Is Unconstitutional

Realizing that there might be some question as to the right of the plaintiff to his salary and that he might insist upon his right to receive the same in the future, the Congress of the United States passed a special act on June 24, 1946, referred to as the Johnson Act, for the specific purpose of preventing the plaintiff from receiving the salary

to which he was entitled as a resigned judge, and the right to which had already accrued and to punish him in a manner not permitted by the Constitution of the United States.

The so-called Johnson Act was entitled the Act of June 24, 1946, (Pub. L. 432), 60 Stat. 304. However, the body of the Act reads as follows:

> "That after July 14, 1945, no payments shall be made under Section 260 of the Judicial Code to Albert W. Johnson * * * who resigned as such judge on July 3, 1945, and who, on July 14, 1945, renounced and relinquished his rights under Section 260 of the Judicial Code to receive the salary therein provided for judges who resign after having served at least ten years and having attained the age of seventy years."

It will be noted that Congress was very careful to use the same expression as appears in Section 260, viz.

> "to receive the salary therein provided for judges who resign."

Plaintiff has alleged that this Act is unconstitutional as a bill of attainder and as destroying a vested right.

The defendant referred to the case of *United States* v. *Lovett,* 328 U. S. 303, for the proposition that the Johnson Act of 1946 is not a bill of attainder or a bill of pains and penalties prohibited by the Constitution of the United States. Were it not for the footnote on page 28 of the defendant's Brief, it is altogether possible that the Johnson Act would not be so construed because, on its face, it is a very innocent looking piece of legislature, but by reading the legislative history of the passage of the Johnson Act of 1946, using the reference given by the defendant in the footnotes of the Brief, we find that this petitioner was indicted, tried, convicted and punished by the 79th Congress of the United States upon the floor of Congress without

being permitted to say or have said one word in his defense. In the *Lovett* case, we find at page 315, that

> "A bill of attainder is a legislative Act which reflects punishment without a judicial trial. If the punishment be less than death, the Act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties."

And again, at page 316:

> "No one would think that Congress could have passed a valid law, stating that after investigation, it had found Lovett, Dodd and Watson guilty of the crime of engaging in 'subversive activities,' defined that term for the first time, and sentenced them to banishment under it from any Government employment. Section 304, while it does not use that language, accomplishes that result. The effect was to inflict punishment without the safeguard of a judicial trial and 'determined by no previous law or fixed rule.' The Constitution declares that this cannot be done either by a State or by the United States."

An examination of Volume 92 of the Congressional Record of the 79th Congress (2d Session), brings to light the entire picture as it was presented by several Congressmen at the time they were considering the passage of the Johnson Act. For example, this volume of the Record, at page 2374 and following, gives a very comprehensive and detailed statement of the charges against Judge Johnson, the Congressional investigation of his conduct as judge, contains statements referring to him as "crooked", and similar opprobious terms; compliments Mr. Goldschein, the prosecuting attorney, the Congressional Committee, the FBI and the newspapers for the splendid job they did in bringing to light this matter, and mentions the fact that Judge Johnson is under indictment. One Congressman remarked that "This is a flagrant case where a federal

judge sold justice," and at page 2376, one gentleman said "We would have impeached him except for the fact that he has resigned and relinquished his retirement salary." (Note: Even in the Congressional Record, his retirement remuneration is called "salary" and not "pension".) At page 2377, the letter in which Judge Johnson withdrew his relinquishment of salary was read into the record, so that *Congress, before passing the Act of* 1946, *had full knowledge that the judge had already withdrawn the relinquishment of his salary.* It was remarked also in the Record that this was the first case of its kind in the history of Congress where a judge facing impeachment, resigned from office and relinquished his salary. They recommended the unanimous passage of the Act so that if the judge should change his mind later and decide to claim his salary, the Act of Congress would stand in his way; although one of the Congressmen did express doubt that the courts would give effect to their action, and as remarked by the gentleman from Iowa, "I am afraid that the courts might consider this as a bill of attainder."

The interesting part about this proceeding in the august chambers of Congress and after the time and effort devoted to it, is that afterwards Judge Johnson was acquitted by a jury of his peers at the end of a long and exhausting trial held in Harrisburg, Pennsylvania on March 24, 1947 of the very charges set out in the indictment which was mentioned by the Congressman.

The Congress said "This is a flagrant case where a federal judge sold justice." The jury said "We, the jury, duly impaneled in the above case, hereby find the defendant Albert W. Johnson, not guilty as charged in the indictment herein."

If Judge Johnson does not receive the salary to which he is entitled because of this Act of Congress, it will be a case of injustice, a case where an innocent man is punished,

without trial. If this is not a bill of attainder or a bill of pains and penalties, which is in the same category, then there is no such thing. We respectfully ask the Court to read the Congressional Record to satisfy itself of this important fact.

The defendant, quoted in the court below from the concurring opinion in the *Lovett* case as reported in 104 Ct. Cl. 107, to the effect that "Congress has the sheer power to withhold current appropriation to individuals, except *for services already rendered.* We submit that when a federal judge has served ten years upon the bench, any money he receives in the future, after his resignation, is for "services already rendered" and, therefore, this statement by the learned judge upholds our position rather than that of the defendant.

The Opinion of Judge Madden on this subject has been referred to at length in the body of our Petition for Certiorari at Page 5, and we will not encumber this Record by repeating it.

We respectfully submit that the learned Judge viewed the law correctly on this phase of our case and that the Act of June 24, 1946, should be held unconstitutional as a Bill of Pains and Penalties in the nature of a Bill of Attainder, and, therefore, wholly ineffective to deprive the plaintiff of his vested right to salary.

Conclusion

It is respectfully submitted that this case calls for the exercise of supervisory powers by this Court and that the Writ should be allowed.

Respectfully submitted,

CHARLES J. MARGIOTTI,
Counsel for Petitioner.

Dated June 30th, 1952.

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 168

ALBERT WILLIAMS JOHNSON, *Petitioner*

v.

THE UNITED STATES

On Petition for a Writ of Certiorari to the United States Court of Claims

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Claims overruling the Government's demurrer (R. 8-20) is reported at 111 C. Cls. 750 and 79 F. Supp. 208. The opinion of the Court of Claims dismissing petitioner's suit upon special findings of fact (R. 26-31) is reported at 104 F. Supp. 106.

JURISDICTION

The judgment of the Court of Claims was entered on April 8, 1952 (R. 32). The petition for a writ of certiorari was filed on July 1, 1952. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Court of Claims erred in holding that petitioner was estopped to claim a salary upon resignation as a federal judge where, to avoid and prevent his impeachment, petitioner filed with the House Judiciary Committee a written waiver under seal of any and all rights to such salary, and the House Judiciary Committee, acting on the intended inducement of that waiver, did not recommend impeachment.

STATUTES INVOLVED

28 U.S.C. (1940 ed.) 375, as amended May 11, 1944, 58 Stat. 218, and the Act of June 24, 1946, 60 Stat. 304, are set forth in the Appendix, *infra*, pp. 14-15.

STATEMENT

Petitioner brought this action in the Court of Claims to recover the salary to which he claimed to be entitled under the provisions of 28 U.S.C. (1940 ed.) 375,[1] upon his resignation as a judge of the United States District Court for the Middle

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[1] 28 U.S.C. (1940 ed.) 375 has been succeeded by 28 U.S.C. 371.

District of Pennsylvania. The facts attendant upon his resignation may be summarized as follows:

For several months prior to June, 1945, a subcommittee of the House Judiciary Committee had been conducting an investigation of the official conduct of petitioner, and he had been invited to appear as a witness at the hearings of the subcommittee (Fdg. 3, R. 22). Petitioner, who had attained the age of 72 and had held the office of United States District Judge for more than twenty years, submitted his resignation to the President of the United States on June 29, 1945 (R. 1, Fdg. 2, R. 22). On July 3, 1945, the President accepted the resignation (Fdg. 2, R. 22). Thereafter, on July 13, 1945, petitioner, accompanied by three counsel, appeared before the subcommittee and was examined and cross-examined. Following the evening recess of the committee, he conferred for approximately three hours with his three attorneys and his son. On the following morning, in order to avoid the embarrassment of further cross-examination and with the expectation that there would be "no further prosecution," petitioner decided to renounce his right to the salary due judges upon resignation (Fdg. 4, R. 22-23, R. 31). Accordingly, he signed and, through one of his counsel, submitted to the subcommittee the following letter:

Committee on the Judiciary, House of Representatives, United States:

I have tendered my resignation as United States District Judge of the Middle District of Pennsylvania to the President of the United States which was accepted July 3, 1945.

I herewith now further renounce and relinquish any right, including financial benefits that I may have under the retirement provision of the Act of Congress, Judicial Code, Section 260, cited in Title 28, United States Code, Section 375, as amended.

In witness whereof I have hereunto set my hand and seal this fourteenth day of July A. D. 1945.

Albert W. Johnson. (Seal.)

Witnessed by: M. J. McDonald, J. H. Bigelow, Thomas M. Lewis. [Fdg. 4, R. 23-24.]

On February 25, 1946, the House Judiciary Committee submitted its report on the investigation of the official conduct of petitioner, House Report No. 1639, 79th Cong., 2d Sess., 92 Cong. Rec. 1592. The report adopted the findings of the subcommittee that petitioner was guilty of such high crimes and misdemeanors as would ordinarily require the interposition of the impeachment powers of the House; that petitioner had notori-

ously engaged in the barter and sale of court offices, notably in bankruptcy proceedings; that his decisions, decrees, orders, and rulings had been sold "for all 'the traffic would bear';" and "that his judicial conduct generally was tainted with fraud * * *." However, because petitioner's resignation had removed him from office, because his age and record precluded him from ever seeking another office, and because of his waiver of any right to salary upon resignation, the committee reluctantly reached the conclusion that, the effect of a judgment in impeachment having been attained, a recommendation for impeachment could not be justified in view of the many issues of vital concern then occupying the attention of the Senate. In order to insure that neither petitioner nor his estate would ever receive any of the salary waived by petitioner, the committee recommended the enactment of special legislation to accept his renunciation of the salary payable to judges upon resignation under 28 U.S.C. 375. On June 24, 1946, such an act was adopted and approved. 60 Stat. 304.

In the meantime, on February 8, 1946, petitioner had addressed a letter to the Director of the Administrative Office of the United States Courts, the Comptroller of the Currency, and the Secretary of the Treasury, alleging that he had been ill and incapacitated physically and mentally and therefore unable to realize the import of his

action at the time he executed the waiver of his right to the salary due upon resignation to a federal judge. The letter purported to revoke his waiver and demanded payment of his salary (R. 3). Payment having been refused, petitioner instituted this proceeding in the Court of Claims.

On the Government's demurrer to the petition, the Court of Claims held that, if petitioner was mentally competent at the time he executed the waiver, he was estopped to claim the benefits he had waived. Because the Government's demurrer admitted the allegation of mental incapacity, the court overruled the demurrer and referred the case to a commissioner for the taking of proof on that issue (R. 16-17). Thereafter, the commissioner filed a report (R. 22-25), which was adopted by the court (R. 26-29), finding that petitioner thoroughly understood the nature and consequences of his act in waiving his claim to the benefits accorded judges upon resignation. Upon these findings, the Court of Claims entered a judgment dismissing the petition (R. 31).

ARGUMENT

Although petitioner advances a variety of questions as a basis for the granting of certiorari (Pet. 8), this unique case, reduced to its essentials, turns upon the application of the well-established principles of estoppel to the peculiar facts attendant upon petitioner's resignation and his

waiver of any rights to the salary provided for judges upon resignation.

At the outset it may be well to note that this case does not involve the Constitutional provision that the compensation of federal judges "shall not be diminished during their continuance in office" (U. S. Const. Art. III, § 1). A judge who retires continues to hold office; he may still perform the duties of the office; and he is entitled to the Constitutional protection against diminution of his compensation during his continuance in that office. *Booth* v. *United States,* 291 U.S. 339. However, a judge who resigns, as did petitioner, vacates his office and is no longer eligible to perform the duties of the office. See *Booth* v. *United States, supra,* 348-351; *Clark* v. *United States,* 109 C. Cls. 444, certiorari denied, 333 U.S. 833; *Bourquin* v. *United States,* 108 C. Cls. 700, certiorari denied, 332 U.S. 762. Likewise unnecessary for disposition of the pending petition is extended consideration of either the jurisdiction of the court below or the accuracy of its holding that petitioner had a contractual right to payment of the salary provided for judges upon resignation.[2]

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[2] It should be noted, however, that the jurisdiction of the Court of Claims in this case is doubtful in view of the limitation imposed by 28 U.S.C. 1501, which provides that "The Court of Claims shall not have jurisdiction of any claim for a pension." Cf. *Randolph* v. *United States,* 158 F. 2d 787 (C.A. 5), certiorari denied, 330 U.S. 839; *Morgan* v. *United States,* 115 F. 2d 426 (C.A. 5); *United States* v. *Beaman,* 61

As the Court of Claims held, this case may be disposed of on the simple and plainly applicable ground of estoppel. From the allegations of the petition (R. 1-6), the report of the House Judiciary Committee, H. Rep. No. 1639, 79th Cong., 2d Sess., and the special findings of the court below (R. 26-29), it appears that at the time petitioner resigned from office his official conduct was being investigated by a subcommittee of the House Judiciary Committtee with a view toward recommending his impeachment. Although he resigned, the investigation continued, and petitioner appeared as a witness before the subcommittee. After an afternoon of cross-examination which was apparently embarrassing to petitioner, he conferred with his counsel and decided to execute a waiver of any rights which he had to a salary

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F. 2d 493 (C.A. 5); *Smith* v. *United States*, 57 F. 2d 998 (C.A. 4); *Lemly* v. *United States*, 75 F. Supp. 248 (C. Cls.); *Gordon* v. *United States*, 26 C. Cls. 307. Further, it is our view that the Court of Claims may well have erred in holding that petitioner obtained a contractual right to the salary provided for the benefit of judges upon resignation. "The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise." *Dodge* v. *Board of Education*, 302 U.S. 74, 79; cf. *Phelps* v. *Board of Education*, 300 U.S. 319; *Wisconsin & M. Ry. Co.* v. *Powers*, 191 U.S. 379; *Butler* v. *Pennsylvania*, 10 How. 402. Particularly where no contribution to a retirement fund has been made, cf. *Dismuke* v. *United States*, 297 U.S. 167, would the salary provided appear to be subject to revocation at the will of the sovereign.

upon resignation. This he did, with full and complete understanding of the nature and consequences of his act, in order to avoid further cross-examination and with the expectation that there would be "no further prosecution." The execution of the waiver had its intended effect: the House Judiciary Committee, noting that the full extent of a judgment in impeachment had thereby been reached, U.S. Const. Art. I, § 3, did not recommend impeachment of petitioner because of the many matters of vital concern then occupying the attention of the Senate. Having reaped the desired benefit of his act, petitioner now seeks to claim that which he renounced with the solemnity of a sealed instrument.[3]

As stated by the Court of Claims (R. 15-16), regardless of whether there was an offer and accept-

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[3] It may be noted that under the law of Pennsylvania (*Land Title Bank and Trust Co.* v. *Freas*, 334 Pa. 26, 5 A. 2d 165; *Balliet* v. *Fetter*, 314 Pa. 284, 171 A. 466; see also 33 Purdon's Pennsylvania Statutes § 6), with which petitioner is no doubt familiar, as well as the general law of contracts, Restatement, *Contracts* (1932) § 110, consideration is not necessary to support a promise made under seal. Nor is acceptance of the promise necessary if the promisee does not reject it upon discovery thereof. Restatement, *Contracts* (1932) § 104. Although there may be some doubt as to the validity of a distinction between sealed and unsealed contracts in the ordinary commercial situation, execution of a promise under seal may be an efficacious way of making a binding obligation without consideration. In any event, petitioner's argument that no consideration was given for his waiver is irrelevant, because this case turns upon the principles of estoppel and not those of contract law.

ance in the contractual sense, petitioner "is estopped in equity and good conscience to assert any claim to those things which he renounced in order to prevent impeachment. No court should lend its aid to recover benefits renounced under such circumstances. To do so would be to countenance the grossest bad faith. It would put the court's stamp of approval on trickery and deceit."

Petitioner seeks to avoid the effect of an estoppel by citation of a line of cases holding that no estoppel can arise from the failure to object to payment of less than the salary provided by statute for public offices (Pet. 17-24). However, such cases are not in point. They deal with the claims of employees holding and performing the duties of office, whereas petitioner resigned his judgeship and no longer holds office. See pp. 3-4, 7, *supra;* cf. *MacMath* v. *United States,* 248 U.S. 151; *Barbour* v. *United States,* 17 C. Cls. 149. They reflect the judicial concern for protecting the standards of employment set by the legislature from detrimental action by the executive branch, cf. *Cochnower* v. *United States,* 248 U.S. 405. This case, on the other hand, involves no effort to thwart the legislative will by reducing or eliminating the pay of an office fixed by statute. Petitioner here voluntarily renounced his pay, which he admittedly could do (see Pet. 20-21), and the only question is whether, after reaping the benefit of that renunciation, he is estopped in the circumstances of this case to withdraw it.

Petitioner also suggests (Pet. 25) that, if he was believed to be guilty of the offenses mentioned in the report of the House Judiciary Committee, Congress had no alternative but to try him by impeachment. Merely an elaboration of the misconceived argument that he made no "contract" with Congress, this suggestion overlooks the dispositive fact that, whether or not he ought to have been impeached, petitioner's renunciation of any further salary payments was intended to lead, and actually led, to abandonment of the proposed impeachment proceedings. He can scarcely be heard now to argue that his purpose was improper and that he should therefore be permitted to nullify the waiver by which he accomplished that purpose.[4] There is, in short, no ground for the argument that this Court should attempt to control the discretionary powers of impeachment, vested exclusively in the House of Representatives, by failing to give effect to the estoppel raised by petitioner's acts before a duly constituted committee of that House. Cf. *United States* v. *Thompson*, 251 U.S. 407; *Confiscation Cases*, 7 Wall. 454; *Howell* v. *Brown*, 85 Supp. 537 (D. Neb.); *United States* v. *Brokaw*, 60 F. Supp. 100 (S.D. Ill.).

There remains for consideration petitioner's contention that the Court of Claims erred in

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[4] Cf. *Daniels* v. *Tearney*, 102 U.S. 415, holding that one who had benefited from the use of an unconstitutional statute was estopped to assert its unconstitutionality as a defense in a suit on a bond executed pursuant to the statute; *Fahey* v. *Mallonee*, 332 U.S. 245, 255-6.

taking judicial notice of the report of the House Judiciary Committee (Pet. 26-30). This contention rests primarily on a misapprehension of the purpose for which the Court took judicial notice of the report. It did not do so to determine whether or not petitioner was guilty of the charges contained in the report, but merely to verify the facts giving rise to the estoppel—that impeachment was being considered and that petitioner's "resignation and renunciation caused the committee to decide not to recommend impeachment." (R. 15.) The reference to the report was clearly proper; it is well-established that a court may take judicial notice of such matters of public record. *Tempel* v. *United States,* 248 U.S. 121; *Brown* v. *Piper,* 91 U.S. 37; *Savannah River Electric Co.* v. *Federal Power Commission,* 164 F. 2d 408 (C.A. 4); *Moore* v. *Cleveland Railway Co.,* 108 F. 2d 656 (C.A. 6); *United States* v. *Aluminum Company of America,* 1 F.R.D. 71 (S.D. N.Y.).

Because the Court of Claims correctly decided this case on the familiar ground of estoppel, it is unnecessary for this Court to consider the constitutionality of the Act of June 24, 1946, 60 Stat. 304, *infra,* pp. 14-15, accepting petitioner's renunciation of his rights to the salary of a resigned judge. However, that Act is clearly distinguishable from the type of legislation involved in *United States* v. *Lovett,* 328 U.S. 303; it constitutes no

more than the acceptance of an offer, the intended irrevocability of which is evidenced by its seal. See footnote 3, *supra*, p. 9. Nor does the Act of June 24, 1946, in any way operate as a permanent bar to further employment of petitioner or a perpetual exclusion from a chosen profession. Cf. *United States* v. *Lovett, supra*, 313-314, 316.

Finally, in addition to the fact that petitioner's contentions are without merit, it seems clear that this unique case is not of such general importance as to warrant review by this Court. No similar or related case has arisen since provision was first made by the Act of April 10, 1869, 16 Stat. 44, 45, Rev. Stat. § 714, for the payment of salaries to federal judges resigning their offices.

CONCLUSION

For the reasons stated above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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SEPTEMBER, 1952.

APPENDIX

28 U. S. C. (1940 ed.) 375, as amended May 11, 1944, 58 Stat. 218, provided:

> When any judge of any court of the United States, appointed to hold his office during good behavior, resigns his office after having held a commission or commissions as judge of any such court or courts at least ten years, continuously or otherwise, and having attained the age of seventy years, he shall, during the residue of his natural life, receive the salary which is payable at the time of his resignation for the office that he held at the time of his resignation. * * *

The Act of June 24, 1946, 60 Stat. 304, provides as follows:

> An Act to accept the renunciation by Albert W. Johnson of pension under section 260 of the Judicial Code.
>
> *Be it enacted* * * * That after July 14, 1945, no payment shall be made under section 260 of the Judicial Code [28 U.S.C. (1940 ed.) 375, *supra*] to Albert W. Johnson (or his estate), formerly district judge of the District Court of the United States for the Middle District of Pennsylvania, who resigned as such judge on July 3, 1945, and who, on July 14, 1945, renounced and relinquished his rights under

section 260 of the Judicial Code to receive the salary therein provided for judges who resign after having served at least ten years and having attained the age of seventy years.

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